IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX APPLICATION NO.10 OF 2006
IN
REFERENCE APPLICATION NO.3 OF 2002

WITH

SALES TAX APPLICATION NO.11 OF 2006
IN
REFERENCE APPLICATION NO.4 OF 2002

The Commissioner of Sales Tax
Maharashtra State, Mumbai
having his office at
Vikrkar Bhavan,
Mazgaon, Mumbai - 400 008 .. Applicant

V/s.

Tata Iron and Steel Co. Ltd.,
Having its office at New
India Assurance Building,
87, M.G. Road, Fort,
Mumbai - 400 001 .. Respondent

Mr.Vinay Sonpal, AGP for the applicant.

Mr.G.S. Jetly, senior advocate with Mr.P.S. Jetly i/by Mulla & Mulla for the respondent.

CORAM : H.L. GOKHALE &
J.P. DEVADHAR, JJ.

DATED : 1ST DECEMBER, 2006.

ORAL JUDGMENT (Per J.P. Devadhar, J.) :

1. Heard.

2. These two reference applications are filed by the Commissioner of Sales Tax ('Commissioner' for short) under Section 61 of the Bombay Sales Tax Act, 1959 (for short 'the Bombay Act') read with Section

9(2) of the Central Sales Tax Act, 1956 (for short "the Central Act'). These two reference applications arise from the order of the Maharashtra Sales Tax Tribunal dated 6th August, 2005.

3. During the period relevant to Assessment Year 1992-1993, the respondent who was a registered dealer under the Bombay Act and the Central Act had imported and sold to its customers certain items of steel and iron and claimed that the sales were in the course of import covered under Section 5 of the Central Act and consequently not liable to tax under Section 75 of the Bombay Act.

4. The Assessing Officer, however, by his order dated 30th March, 1996 held that the local sales and the inter state sales of iron and steel effected by the respondent were neither covered under the first limb (sale occasioning such import) nor under the second limb (sale by transfer of documents of title before the goods crossed the Customs Frontiers of India) of Section 5(2) of the Central Act. The appeals filed by the respondent against the assessment orders, both under the Bombay Act and the Central Act were dismissed by the first appellate authority on 3rd April, 2000. On second appeals filed by the respondent, the Maharashtra Sales Tax Tribunal by its order dated 9th October, 2001 held that in the facts

of the case, the sales were covered under both limbs of Section 5(2) of the Central Act. While rejecting the contention of the Commissioner that the imported goods were unascertained goods covered under Section 18 of the Sale of Goods Act and, therefore, such unascertained goods could not be sold on high sea sale basis, the Tribunal held that the provisions of Sale of Goods Act are not applicable in the instant case.

5. On reference applications filed by the Commissioner, the Maharashtra Sales Tax Tribunal by the impugned order dated 6th August, 2005 held that although questions of law do arise from the order of the Tribunal relating to the sales covered under the second limb of Section 5(2) of the Central Act, in view of the fact that the sales were covered by the first limb of Section 5(2) of the Central Act, the sales were exempt from tax and, therefore, no useful purpose would be served by referring the questions relating to the second limb of Section 5(2) of the Central Act. Being aggrieved by the aforesaid order, these two reference applications are filed by the Commissioner. Since the issues in both the applications are common, we set out hereinbelow the questions raised in Sales Tax Application No.10 of 2006 :

(i) Whether on the facts and in the circumstances of the case, the Tribunal was

justified in law in allowing the claim of Rs.51,36,02,035/- in respect of various transactions of Local Sales and Rs.1,67,16,740/- in respect of interstate sales (As per Annexure A) covered by four bulk imports by ships and which were in unascertained stage till the clearance from Customs as sales in the Course of import by transfer of document of title to the goods within meaning of section 5(2) of the Central Sales Tax Act, 1956 read with section 75 of the Bombay Sales Tax Act, 1956 and hence not liable to tax under the B.S.T. Act 1959 or C.S.T. Act 1956 ?

(ii) Whether on the facts and in the circumstances of the case the Tribunal was justified in law holding that the provisions of the Sale of Goods Act, 1930 particularly section 18 of the Sales of Goods Act 1930 is not applicable to transactions in dispute ?

(iii) Whether on the facts and in the circumstances of the case and on a true and correct interpretation is the Tribunal justified in law in holding that the impugned sales are also sales in the course of import and covered by first limb of section 5(2) of C.S.T. Act 1956 and exempt from tax ?

(iv) Whether on the facts and in the circumstances of the case was the Tribunal was justified in directing to delete consequential interest of Rs.1,47,91,738/- levied u/s.36(3) of the B.S.T. Act ?

6. According to Mr.Sonpal, learned counsel for the Commissioner, the imports made by the respondent were neither covered under the first limb nor under the second limb of Section 5(2) of the Central Act and, therefore, the Tribunal ought to have referred all the questions raised in the applications for the opinion of this Court.

7. With reference to the applicability of the

first limb of Section 5(2) of the Central Act is concerned (Question No.3), Mr.Sonpal submitted that in the present case, all the guidelines laid down by the Apex Court in the case of K. Gopinath Nair V/s. State of Kerala reported in 105 STC 580 have not been complied with and the Tribunal has only made cursory remarks that the sales were in the course of import and that the nexus between the overseas supplier and the local buyer has been established.

8. Mr.Sonpal further submitted that in the present case there is no material on record and there is no discussion as to how the findings have been arrived at. In the present case, admittedly letters of credit have not been executed by the local purchasers in favour of the foreign supplier. Therefore, there was no privity of contract between the foreign supplier and the local purchasers. Thus, in the present case there were two independent contracts, one between the respondent and the overseas supplier and another between the respondent and the local buyers. The Tribunal has nowhere discussed that the respondent was only an agent between the foreign supplier and the local purchasers and that the import is directly between the foreign supplier and the local purchasers on principal to principal basis. Accordingly, it is submitted that the findings recorded by the Tribunal being totally perverse and

there being no privity of contract or nexus between the local sale and the import, the questions raised by the Commissioner must be considered on merits.

9. In any event, Mr.Sonpal submits that having held that the questions of law (question No.1 and 2) do arise from the order of the Tribunal relating to the sales by transfer of documents of title covered under the second limb of Section 5(2) of the Central Act, the Tribunal ought to have referred the said questions for the opinion of this Court. He submitted that the first limb and the second limb of Section 5(2) of the Central Act deal with two different situations and both situations cannot coexist. Therefore, the findings of the Tribunal that the sales though not covered under the second limb, they are covered under the first limb of Section 5(2) of the Central Act is totally perverse. He submitted that the goods imported were unascertained goods covered under Section 18 of the Sale of Goods Act and the Tribunal was in error in holding that the said Act is not applicable in the present case. Relying upon various decisions of the High court and the Apex Court, Mr.Sonpal submitted that the questions do arise from the order of the Tribunal and this Court must direct the Tribunal to draw a statement of the case and refer the questions set out in the applications for the opinion of this Court.

10. Mr.Jetly, learned senior advocate appearing on behalf of the respondent referred to various documents furnished by the respondent before the Assessing Officer and submitted that in the present case the Tribunal on perusal of those documents came to the conclusion that sale occasioned movement of the goods and, therefore, sales were covered by the first limb of Section 5(1) of the Central Act. Relying upon various decisions of the Apex Court, Mr.Jetly submitted that once it is established on facts that the sales are covered under the first limb of Section 5(2) of the Central Act, the tax liability becomes exempted and in such a case the question as to whether the sales are covered under the second limb of section 5(2) of the Central Act becomes wholly academic. In these circumstances, Mr.Jetly submits that the Tribunal was justified in rejecting the reference applications filed by the Commissioner.

11. Having heard the counsel on both sides and having perused the orders passed by the Tribunal, we are of the opinion that the grievance of the Commissioner that there are no materials on record and that the Tribunal has not discussed as to how the sales are covered under the first limb of Section 5(2) of the Central Act is wholly unjustified. On perusal of the order passed by the Tribunal it is seen that

the Tribunal in paras 38 to 45 of the judgment has discussed in detail the terms of the contract entered into by and between the respondent and the local buyers and after analysing the terms of the contract and the subsequent chain of events came to the conclusion that there is an inextricable link between the import and sale of goods in question. The Tribunal has recorded findings to the effect that the contract between the respondent and the local buyers preceded the contract between the respondent and the foreign suppliers. As per the contract entered into by and between the respondent and the local buyers, the respondent was to import goods from the foreign supplier named therein and supply at the prices mentioned therein. The Tribunal has noticed that as per the written agreement, irrevocable letters of credit were to be opened by the local buyers and in fact such letters of credit have been opened by the local buyers in favour of the respondents. Thereupon, the respondent placed orders for import of goods by opening irrevocable letters of credit in favour of the foreign suppliers. The orders placed were for the same commodity set out in the contracts entered into by and between the respondent and the local purchasers. The Tribunal has noted that the commercial invoices issued by the foreign suppliers contained the name of the local buyers to whom the goods were to be supplied and even the bills of lading

contained the names of the local buyers. The Tribunal has further recorded that in the present case, the imported goods have been in fact cleared by the local purchasers by filing bills of entry. Thus, the findings recorded by the Tribunal that the sales occasioned the movement of goods into the country and hence covered under the first limb of Section 5(2) of the Central Act are findings based on analysis of facts which are record. The genuineness of the transactions are not doubted and the documents furnished by the respondent are not disputed by the Sales Tax Authorities.

12. Though there were two sets of letters of credit, one by the local buyers in favour of the respondent and another by the respondent in favour of foreign supplier, the Tribunal on appreciation of facts has held that there was inextricable link between sale and import. Referring to the decision of the Apex Court in the case of Gopinath Nair (Supra), the Tribunal held that in the present case, even though there were back to back contract, the link between the two has not been severed. In these circumstances, the contention of the Commissioner that there are no material on record and that the Tribunal has not discussed the issue in detail relating to applicability of the first limb of Section 5(2) of the Central Act cannot be accepted. As the findings that

sales are covered under the first limb of Section 5(2) of the Central Act are based on facts, the Tribunal was justified in rejecting the third question raised by the Commissioner.

13. Once the Tribunal held that in the present case the sales were covered under the first limb of Section 5(2) of the Central Act and, consequently exempt from payment of tax, the question as to whether the sales were exempt under the second limb of Section 5(2) of the Central Act became academic. In this view of the matter, the refusal on the part of the Tribunal to refer Question Nos.1 and 2 relating to the applicability of the second limb of Section 5(2) of the Central Act as well as the provisions of the Sale of Goods Act to the transactions in question cannot be faulted. Similarly, Question No.4 being consequential, the said question has not been referred.

14. However, we expressly make it clear that we have declined to refer questions No.1 and 2 because in the facts of the present case the said question are academic in nature and it will be open to the department to agitate those questions in any appropriate case before the appropriate forum.

15. In the result, we hold that the decisions of

the Tribunal in the present case are is based on facts and, therefore, the orders passed by the Tribunal in rejecting the Reference Applications filed by Commissioner cannot be faulted. Accordingly, we dismiss both the reference applications with no order as to costs.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)